THE LAW OF DRAMATIC COPYRIGHT

I. LITERARY PROPERTY AT COMMON LAW.—There have been few legal questions so generally and so fully discussed as that relating to the property of authors in their writings. Up to 1769, it was generally conceded that authors enjoyed, by virtue of the common law, a perpetual copyright, and copyrights were sold and made the basis of family settlements. In 1769, the great case of *Millar* v. *Taylor*,[1] was decided. An action had been brought in 1766 to recover for the piracy of "Thomson's Seasons," and it was held by a majority of the judges, Lord Mansfield, Mr. Justice Aston and Mr. Justice Willes, Mr. Justice Yates dissenting, that perpetual copyright existed at common law, that the common law right existed after publication, and was not taken away or limited by the statute. A writ of error was afterwards brought, but the plaintiff in error, after assigning errors, suffered himself to be nol-prossed, and the Lords Commissioners, at the Trinity term, 1770, granted an injunction. The case of *Donaldson* v. *Becket*,[2] came before the House of Lords upon an appeal from a decree of the Court of Chancery, founded upon the judgment in *Millar* v. *Taylor*.[3] The House summoned the judges to advise it, and they were requested by the Lords to deliver their opinions on the following questions:

1. Whether at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published and sold the same without his consent?
2. If the author had such right originally, did the law take it away, upon his printing and publishing such book or literary composition, and might any person afterward reprint and sell, for his own benefit, such book or literary composition, against the will of the author?
3. If such action would have lain at common law, is it taken away by the statute of 8th Anne? And is an author by the said statute precluded from every remedy, except on the foundation of the said statute, and on the terms and conditions prescribed thereby?

---

[1] 4 Burr. 2303. [2] (1774) 4 Burr. 2408.

[3] Donaldson *v.* Becket was therefore a case involving the same subject-matter as Millar *v.* Taylor, and the same interests. Millar died pending the appeal, and his executors sold the copyright to Becket, who brought suit against Donaldson for infringement, which accounts for the change in title, and while not technically an appeal from the reported case of Millar *v.* Taylor, which was in the Court of King's Bench, Donaldson *v.* Becket was an appeal from a decree of the Court of Chancery founded on this judgment at law.

4. Whether the author of any literary composition and his assigns, had the sole right of printing and publishing the same in perpetuity, by the common law?
5. Whether this right is in any way impeached, restrained, or taken away by the statute 8th Anne?

Of the eleven judges who delivered opinions, ten held that at common law the author of any book or literary composition had the sole right of first printing and publishing the same for sale, and could bring an action against any person who printed, published and sold the same without his consent. One (Mr. Baron Eyre) denied it absolutely, and two (Mr. Baron Perrott and Mr. Baron Adams) affirmed the right, but denied that an action could be brought unless the copy had been obtained by the pirate by fraud or violence.

Seven judges held that the law did not take away the author's right upon his printing and publishing his book or literary composition, and that no person might afterward reprint and sell for his own benefit such book or literary composition against the will of the author. Four (Mr. Baron Eyre, Mr. Baron Perrott, Mr. Baron Adams, and the Lord Chief Justice of the Court of Common Pleas) held the contrary.

Six judges held affirmatively on the third question, that the right was taken away by the statute of 8th Anne, and that an author by this statute was precluded from every remedy except those founded upon it. Five (Ashurst, Blackstone, Willes, and the Lord Chief Baron) were of the opposite opinion.

On the fourth question, the judges decided seven affirmative to four negative, and on the fifth, six voted in the affirmative and five in the negative.

Lord Mansfield, though present, did not deliver an opinion.[1] The reporter says:[2]

"It was notorious that Lord Mansfield adhered to his opinion; and therefore concurred with the eight upon the first question; with the seven upon the second; and with the five upon the third. But it being very unusual (from reasons of delicacy) for a peer to support his own judgment, upon an appeal to the House of Lords, he did not speak."

Lord Camden[3] moved the house that the decree be reversed. He

[1] The reasons given by the judges for their views are not given in the report of the case in 4 Burrow's, but may be found in 17 Cobbett's Parliamentary History, 954-971-991, where the arguments of counsel are also reported.

[2] 4 Burr. 2417.

[3] Cobbett's Parl. Hist. 991.

spoke at length and with considerable bitterness, denying absolutely the existence of any right after publication not based upon the statute.

Lord Chancellor Apsley,[1] who had granted the injunction appealed from, seconded Lord Camden's motion to reverse, and the motion was carried, the vote being twenty-six to eleven for reversal.

The universities, alarmed at the consequences of the ruling in this case, applied for and obtained an Act of Parliament establishing, in perpetuity, their right to all the copies given them theretofore, or which might hereafter be given to, or acquired by, them.[2]

The result, therefore, of *Millar* v. *Taylor* and *Donaldson* v. *Becket*, was to establish the following propositions:

1. That at common law an author had the absolute property in his unpublished manuscript and the sole right first to print and publish.
2. That at common law this right was not lost by publication, but that after publication the author had a perpetual copyright.
3. But that by the enactment of the Statute of 8th Anne, the previously existing common law right was extinguished, and that the author was precluded from every remedy not founded upon the statute.

The law of England remained in this condition until 1854, when *Jeffreys* v. *Boosey* [3] was decided by the House of Lords.

The judges were summoned, and Lord Chief Justice Jervis, Lord Chief Baron Pollock, Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Maule, Mr. Justice Wightman, Mr. Justice Erle, Mr. Baron Platt, Mr. Justice Williams, and Mr. Justice Crompton attended and gave opinions. The question of the existence of copyright at common law was not perhaps absolutely necessary to the decision, but several of the judges who were summoned by the House to advise it expressed themselves on the subject. The sole right of an author to first print and publish his manuscript was not questioned.

Mr. Justice Erle held strongly to the view that copyright existed at common law, and that the right was not lost by publication, or taken away by the statute. Mr. Justice Coleridge, while not deem-

---

[1] Cobbett's Parl. Hist. 1002.

[2] 15 Geo. III., C. 53. The booksellers were not so fortunate. Relying on Millar *v.* Taylor and the perpetual common law copyright, independent of the Statute of Anne, which was there held to exist, many of them invested their whole fortunes in copyrights, only to find them rendered worthless by the decision of the House of Lords in Donaldson *v.* Becket. They applied to Parliament for relief, but without success, and many were entirely ruined. 17 Cobbett Parl. Hist., 1077.

[3] 4 H. L. S. 461.

ing it necessary to express a positive opinion, leaned in favor of the right. Mr. Justice Wightman, Mr. Justice Maule, Mr. Justice Alderson, Mr. Justice Williams, and Mr. Justice Crompton gave no opinion on the question. Lord Chief Baron Pollock, Lord Chief Justice Jervis, and Baron Parke were of opinion that there was no common law right after publication, and so advised the house; and the Lord Chancellor, Lord St. Leonards, and Lord Brougham, the law lords, were unanimous against the existence of a common law right after publication, and decided squarely that no such right existed.[1]

Thus the controversy, which had been waged in England for nearly a century, was finally settled, and the ruling of the law lords in *Jeffreys* v. *Boosey* has been accepted as decisive by the English courts.[2]

---

[1] The confusion which has arisen in this country over the construction of Donaldson *v.* Becket and Jeffreys *v.* Boosey is probably due to lack of familiarity with the usages of the House of Lords. From very early times it has been customary for the House of Lords to summon the common law judges, barons and others to attend and give opinions on points of law upon which the lords wish to be informed. At one time the judges acted not only as advisers, but had a correlative voice with the lords in deciding matters before the house. Subsequently, however, this power was much abridged, and at the time of the decision of the two cases here discussed the judges were summoned simply to express their opinions and advise the lords, with whom alone the decision rested. The opinions of the judges are valuable as indicating the views of the eminent lawyers who gave them, but were advisory merely and did not affect the decision in the case except where adopted and followed by the house. In Donaldson *v.* Becket, the actual decision rested with the House of Lords, which stood twenty-six to eleven for reversal, and in Jeffreys *v.* Boosey, the Lord Chancellor, Lord St. Leonards and Lord Brougham were the law lords who decided the case, and they, in adopting the view of Lord Chief Justice Jervis, Lord Chief Baron Pollock and Baron Parke, held that no common law right in literary matter existed after publication. See Sir Matthew Hale's Jurisdiction of the Lord's House in Parliament, Chap 27, III. May's Law and Usages of Parliament, pp. 57, 253. The King's Peace (Social England Series), by F. A. Inderwick. 206, 207.

[2] Caird *v.* Sime, L. R. 12 A. C. 343; Reade *v.* Conquest, 9 C. B. (N. S.) 755, 765.

It is said in a recent number of the *Law Times* (June 28, 1902), 113 L. T. 197: "In Scotland as in England, copyright is of purely statutory origin, and the theory of 'common law copyright' so pertinaciously asserted in the English courts until finally discredited in Donaldson *v.* Becket, (4 Burr. 2408) never received any encouragement from the Court of Sessions."

The Scotch cases are as follows: Midwinter *v.* Hamilton, Morrison's Dictionary of Decisions, 8307; Hinton *v.* Donaldson, Mor. Dict. Dec. 8307, 5 Paton. App. Cas. 505, Hailes, 535; Cadell *v.* Robertson, in the Court of Sessions, Mor. Dict. Dec. 8310, 5 Paton App. Cas. 498, note; in English House of Lords, 5 Paton App. Cas. 493, Lord Eldon's opinion is on page 501 (1811); see also, note in 5 Paton, 505, and other cases reported in Morrison's Dictionary of Decisions, Scottish Court of Sessions, title, "Literary Property."

In this country the Supreme Court, in *Wheaton* v. *Peters*[1] held that no common law copyright existed after publication, and it may be regarded as settled that whatever rights an author has in the product of his brain, exist, after publication, not by the common law, but solely by virtue of the copyright act.[2]

Although the majority of lawyers and judges in this country and in England have accepted the proposition that copyright is solely the creation of statute, there have been many great and learned men who have resolutely refused to accede to this view, and who have maintained their position most ably. No one can read the judgments of Lord Mansfield, Mr. Justice Willes, and Mr. Justice Aston, in *Millar* v. *Taylor*, the opinion of Mr. Justice Erle in *Jeffreys* v. *Boosey*, in 4 H. L. Cas., Lord Campbell's judgment when the case was before the Court of Exchequer (6 Exc. 580), and the dissenting opinions of Justices Thompson and Baldwin in *Wheaton* v. *Peters*, without being convinced that there is much to be said upon the other side, and that it has been said by these eminent men with surpassing ability.

II. THE STATUTES.—The first English copyright act was 8 Anne, c. 19, passed in 1709, which was entitled as follows: "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies during the time therein mentioned." Since the enactment of this original statute, which applied only to books, the subject-matter of copyright protection has been broadened by successive acts. 8 Geo. II., c. 13 (1735) added historical and other prints. 12 Geo. II., c. 36 (1739) prohibited the importation of books reprinted abroad. 7 Geo III., c. 38 (1767) amended 8 Geo. II., c. 36, and included maps, charts, plans and other prints. 15 Geo, III., c. 53 (1775) granted to the various universities the perpetual copyright in books bequeathed to them. 17 Geo. III., c. 57 (1777) provided a penalty and double costs upon infringement of copyright in historical and other prints. 27 Geo. III., c, 38 (1787), 29 Geo. III., c. 19 (1789) and 34 Geo III., c. 23 (1794) extended copyright protection to prints and designs on cloth. 38 Geo. III., c. 71 (1798) protected models and casts of busts. 41 Geo. III., c. 107 (1801) was in reference to books. 54 Geo. III., c. 56 (1814) protected sculptures. 54 Geo. III., c. 156 (1814) related to books. 3 Will. IV., c. 15 (1833) was

[1] (1834) 8 Peters, 591.

[2] Wheaton *v*, Peters, 8 Pet. 591, 664; Holmes *v*, Hurst, 174 U. S. 82; Holmes *v*. Donohue, 77 Fed. 179.

the act which created what was termed in its title "Dramatic literary property," and provided that the "author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, . . . shall have . . the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever . . ," and applied also to unpublished plays. Act 5 & 6 Will. IV., c. 65 (1835) protected lectures. The act of 5 & 6 Vict., c. 45 (1842), repealed the act of 8 Anne, c. 19, 41 Geo. III., c. 107 and 54 Geo. III., c. 156, substituted an entirely new literary copyright act, protected dramatic property in the terms of 3 & 4 Will. IV., c. 15, which was not repealed, extended its terms to include musical compositions, and created the new right of exclusively performing musical compositions in public.

In the United States the original copyright act, passed May 31, 1790,[1] protected books, maps and charts, and prohibited copying. The scope of the first statute was not enlarged by the act of April 29, 1802.[2] The act of February 3, 1831,[3] included books, maps, charts, dramatic or musical compositions, prints, cuts, and engravings, but only forbade the making of copies. The act of August 10, 1846,[4] did not make any addition in the subjects to be protected, to the previous enactments. The act of August 18, 1856,[5] for the first time protected dramatic compositions, and gave, in addition to the exclusive right to print and publish, the sole right of representation. The act of March 3, 1865,[6] extended protection to photographs and negatives. The act of July 8, 1870,[7] included books, maps, charts, dramatic or musical compositions, engravings, cuts, prints, photographs and negatives, paintings, drawings, chromos, statues, statuary, models and designs, the sole right of publicly performing dramatic compositions, and the sole right to dramatize and translate books. The present copyright statute is the Act of March 8, 1891,[8] The Act of January 6, 1899[9] protects the owner of the copyright of a musical composition in its exclusive public performance by providing a recovery for unauthorized presentation.

[1] 1 Statutes at Large, 124.
[2] 2 Statutes at Large, 171,
[3] 4 Statutes at Large, 436.
[4] 9 Statutes at Large, 106.
[5] 11 Statutes at Large, 138.
[6] 13 Statutes at Large, 540.
[7] 16 Statutes at Large, 212.
[8] 26 Statutes at Large, 1106.
[9] 29 Statutes at Large, 481.

The object of this rather tedious tabulation of dry statutory enactments is to show that the statutory law of copyright has been a matter of gradual development. From the first and meager protection accorded books alone, it has grown to its present proportions. Dramatic copyright or playright, as distinguished from copyright proper, is of recent origin. It was created in England by Act 3 & 4 Wm. IV., c. 15, in 1833, and in the United States by the Act of August 18, 1856.

III. DRAMATIC RIGHTS AT COMMON LAW.—Since copyright is the creation of statute, it follows as a necessary corollary that only those things expressly enumerated in the statute can be protected, and that any additional right must first be created by statutory enactment before protection can be successfully sought. Before the dramatic copyright acts, plays were protected before publication as manuscripts, in the same manner as purely literary work.[1] After publication they were protected as books, and the making of unauthorized copies forbidden, but the exclusive right of public performance or representation, as distinguished from the right to multiply copies, did not exist,[2] until created by statute.[3]

It was said by Lord Denman[4] that the decision of *Murray* v. *Elliston*, that stage right did not exist at common law, was the cause of the enactment of 3 & 4 Wm. IV., c. 15, which created it. Since then it has been held that the acting right is a new and distinct property, existing separately from, and independently to, copyright, and either may be assigned without the other.[5]

IV. DRAMATIC COMPOSITIONS. — Judge Blatchford, in *Daly* v. *Palmer*, defines a dramatic composition as follows:

"A dramatic composition is such a work in which the narrative is not related but is represented by dialogue and action. When a dramatic compo-

---

[1] Macklin *v.* Richardson, Amb. 694.

[2] Murray *v.* Elliston, 5 Barn. & Ald. 657; Coleman *v.* Wathen, 5 T. R. 245; Toole *v.* Young, L. R. 9 Q. B. 523, Cockburn, C. J., 527; Chappell *v.* Boosey, L. R. 21 Ch. D. 232, 238; Keene *v.* Wheatley, 9 Am. L. Reg., 33, 14 Fed. Cas. 180, 202; Palmer *v.* Dewitt, 47 N. Y. 532, 542.

[3] Chappell *v.* Boosey, L. R. 21 Ch. D. 232. In the same way before the musical copyright act, a sheet of music was protected as a book. *Clementi* v. *Goulding*, 2 Camp. 32; *Bach* v. *Longman*, 2 Cowp. 623; *D'Almaine* v. *Boosey*, 1 Y. & C. (Exch). 288; *White* v. *Geroch*,, 2 Barn. & Ald. 298; but there was no exclusive right of public performance before the Act of 5 & 6 Vict., C. 45. *Chappell* v. *Boosey*, L. R. 21 Ch. D. 232, 238.

[4] Russell *v.* Smith, 12 Adolphus & Ellis, 217, 236, and by Mr. Justice North in Chappell *v.* Boosey. L. R. 21 Ch. D. 232, 241.

[5] Chappell *v.* Boosey, L. R. 21 Ch. D. 232, 239.

[6] 6 Blatch, 256, Fed. Cas. 3552. See also, Daly *v.* Webster, 56 Fed. 483, 486.

sition is represented in dialogue and action, by persons who represent it as real, by performing or going through with the various parts or characters assigned to them severally, the composition is acted, performed or represented; and if the representation is in public, it is a public representation. To act, in the sense of the statute, is to represent as real, by countenance, voice or gesture, that which is not real. A character in a play who goes through with a series of events on the stage without speaking, if such be his part in the play, is none the less an actor in it than one who, in addition to motions and gestures, uses his voice. A pantomime is a species of theatrical entertainment, in which the whole action is represented by gesticulation, without the use of words. A written work, consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition designed or suited for public representation, as if language or dialogue were used in it to convey some of the ideas."

It has been held that scenes and situations irrespective of dialogue,[1] a song which relates the burning of a ship at sea, and the escape of those on board, describes their feelings, and sometimes expresses them in the supposed words of the sufferers, though given by only one person, seated at a piano, without scenery or costuming,[2] a song entitled "Come to Peckham Rye," sung and acted in character,[3] three songs from an opera,[4] or pantomime,[5] are all dramatic entertainments. A spectacular adaptation of "Much Ado About Nothing," with original music and other new matter, was held to be a dramatic composition and entitled to copyright as a new work.[6] A new operetta, "Erminie," based upon an old play, "Robert Macaire," is a new dramatic work, and as such is entitled to protection.[7] And the interpolation of new scenes and incidents in old and common matter creates a protective right in the composition.[8]

A dramatic composition must be original [9] and possess literary or dramatic merit, though not necessarily of a very high order. It must be more than a mere mechanical contrivance, must not be

---

[1] Chatterton *v.* Cave, Brett. L. J., 33 L. T. (N.S.) 356.

[2] Russell *v.* Smith. 12 Ad. & El. 217.

[3] Clark *v*, Bishop, 25 L. T. (N. S.) 908.

[4] Planché *v.* Braham, 4 Bing. (N.C.) 17.

[5] Lee *v.* Simpson, 3 C. B. 871; Daly *v*, Palmer, 6 Blatch, 256, F. C. 3552; Daly *v.* Webster, 56 Fed. 483, 486.

[6] Hatton *v.* Kean, 97 Eng. Com. Law (7 C. B. N.S.) 268.

[7] Aronson *v.* Fleckenstein, 28 Fed, 25. Aronson *v.* Baker, 43 N. J. Eq. 365; 12 Atlantic, 177.

[8] Chatterton *v.* Cave, 33 L. T. (N, S.) 356.

[9] Martinetti *v.* Maguire, Deady, 216, Fed. Cas. 9173; Serrana *v.* Jefferson, 33 Fed. 347.

immoral, and must tell, either in dialogue or action, a connected and intelligent story.

As long as the dramatic composition is not immoral[1] or entirely worthless, it need only possess a very moderate degree of merit. For instance, in *Henderson* v. *Tompkins*,[2] the complainant was proprietor of the Chicago Opera House, where he presented a dramatic composition entitled "Ali Baba, or Morgiana and the Forty Thieves," of which he was the owner of the copyright. It was solemnly alleged in the bill:—

"That a part of said dramatic composition was as follows: 'Cassim (scornfully): But Ali Baba's election is certain. Nico: I know it. Arraby: How do you know? Hack: She had a dream last night. Caliph (coming down stage): I wonder if dreams come true.'" And that the said dialogue was then immediately followed by a song entitled, 'Quartette for Ali Baba: I wonder if Dreams Come True,' consisting of a number of verses of eight lines, in each of which the second, fourth and eighth lines consist of the refrain, 'I wonder if dreams come true,' and the chorus after each verse is as follows: 'Hi diddle diddle, the cat and fiddle, the parrot and monkey too. Bells they are ringing, there's fighting and singing, I wonder if dreams come true;' and that of each of the said verses, all except the second, fourth and eighth lines aforesaid, were of a so-called 'topical' nature (that is to say, relating to topics of current interest), and that the matter of the said topical lines was intended to be changed or varied from time to time to introduce allusions to new topics, the whole constituting what is known as the topical song, 'I Wonder if Dreams Come True.'"

It was then alleged:—

"That the song with its introduction formed a substantial and valuable part of complainant's dramatic composition; that defendant presented a certain dramatic composition at the Boston Theater, Boston, of which he was proprietor, and that a substantial and material and important portion consists of a dialogue between various characters in relation to having had a dream, the said dialogue terminating in a speech by one of said characters, as follows: 'I wonder if dreams come true,' which said speech is immediately followed by a topical song of a number of verses of eight lines each, the second, fourth and eighth of which consist of the words or refrain, 'I wonder if dreams come true;' that each of said verses is followed by the chorus of your orator's said song, and that the remainder of the lines in each verse are topical in character, and in substantial imitation of the said topical portions of your orator's said copyrighted song."

A demurrer was interposed to the bill, and it was argued that the so-called dramatic composition was so utterly worthless and insig-

---

[1] Martinetti *v.* McGuire, Deady, 216, F. C. 9173; Broder *v.* Zeno Mauvais Music Co., 88 Fed. 74; Shook *v.* Daly, 49 How. Pr., 366, 368.

[2] 60 Fed. Rep. 758.

nificant as to be unworthy of protection. In overruling the demurrer, Judge Putnam said (p. 762):

"The defendant alleges that the subject-matter of this copyright does not tend to promote the progress of science and useful arts, and therefore is not within the scope of the power granted congress by the constitution. So far as this is a general proposition, aimed at all dramatic compositions of the character in question in the case at bar, it needs but little consideration. The court is not disposed to take the narrow view of the expression 'useful arts' propounded on either side of this case, nor does it deem it necessary to determine whether the purpose announced in this paragraph of the constitution directly or indirectly limits the powers of congress, as claimed by the defendant, and denied by the complainant. It is enough to say that whether we look only at the direct results of what is addressed to the taste, the imagination, or the capacity of being amused, and the enjoyment which immediately follows therefrom, or whether we look further, and consider what is essential to keep the physical, moral and intellectual powers refreshed, all such have been regarded by the courts, ever since patents or copyrights were authorized by statute, as within the range of utility and the useful arts. Even when the intellect is strained to accomplish its greatest results, the standard prescription from Euclid may be useful, but an occasional one from the Book of Nonsense is not to be despised."

. . . . . .

"But the question need not be pursued, as it is fully covered by the decisions of the Supreme Court. In *Lithographic Co.* v. *Sarony*, 111 U. S. 53, 4 Sup. Ct. 279, the constitutional question was directly considered, and the monopoly of a photograph of 'one Oscar Wilde' was protected.

"This, however, runs off into another line of propositions insisted on by the defendant, which to a certain extent, illustrate those already considered, and are also, to a certain extent, covered by what we have said on the question of originality. We refer to the claim that the subject-matter of what is set out by complainant is too trivial to demand the notice of the law. There is, in the main, the same difficulty in considering this question on demurrer that arose with reference to the first proposition discussed. It is true that some matter may be copyrighted, so trivial that the court can see, as a matter of judicial sense, that it is so clearly unimportant as not to be within the statute. But, in the field in which this copyright belongs, it is not easy for the court to make a determination of that character. This comes from the peculiarity of the essential nature of the subject-matter. If judicial tribunals could lay down maxims by which to determine judicially what dramatic compositions claimed to be humorous, or to appeal to the sense of humor, are in this particular within or without the copyright act, they would, by demonstration, be in possession of rules which would enable them to be themselves at all times witty, at their own option. The very essence of some kinds of humor is in unexpectedness and lack of proportion; and therefore neither courts nor juries have any certain rule for valuing it, except such as comes from evidence of the effect which the composition in question has on masses of men. The claim made by the defendant that 'the box-office value' fails to furnish any test under the copyright laws of the United States, with reference to dramatic compositions, is not sustainable. While, on the question

of the patentable novelty of a patented article, its salability is to be considered only guardedly, and in doubtful cases, yet with reference to matters like this at bar, touching which there are no rules except in the unmeasured characteristics of humanity, their reception by the public may be the only test on the question of insignificance or worthlessness under the copyright statutes.

. . . . . .

"With reference to this subject, the courts have not undertaken to assume the functions of critics, or to measure carefully the degree of originality, or literary skill or training involved. An example of the moderate degree of literary merit sufficient to entitle a dramatic composition to protection under the statutes, is found in *Daly* v. *Palmer*, 6 Blatchf. 256, Fed. Cas. No. 3, 552, and again in *Daly* v. *Webster* (decided by the Court of Appeals for the second circuit), 4 C. C. A. 10, 56 Fed. 483, each touching the 'railroad scene,' so called. There is also the case, not officially reported, of the comic song entitled, 'Slap, Bang, Here We Are Again!' protected by the common pleas division, although the impression which the title gives would suggest little value, except what might be shown by sales. It appeared in this case that the copyright was worth from £1,000 to £2,000, and at the time of the trial as many as 90,000 copies had been sold."

Martinetti v. *Maguire*,[1] involved the alleged copyright to a theatrical spectacle entitled "The Black Crook." Judge Deady, in discussing the merit of the piece observed:

"On the other hand, if this play is a 'dramatic composition,' within the purpose and meaning of the act of congress (4 Stat. 436; 11 Stat. 138), the motion of the complainants—Maguire et. al.—for an injunction against Martinetti et al. should be allowed. But as at present advised, I do not think it such a composition. All the witnesses agree—particularly the experts—that the so-called play of the Black Crook has no originality, and that it consists almost wholly of scenic effects, or representations taken substantially from well-known dramas and operas. The evidence of W. B. Hamilton, the stage manager of the Metropolitan, is explicit and satisfactory on that point. He has been an actor since 1828, in both Europe and America. He appears to be well informed in what pertains to his profession, and impressed me with his fairness and candor.

"The Black Crook is a mere spectacle—in the language of the craft a spectacular piece. The dialogue is very scant and meaningless, and appears to be a mere accessory to the action of the piece—a sort of verbal machinery tacked on to a succession of ballet and tableaux. The principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or no dress, and in attractive attitudes or action. The closing scene is called Paradise, and as witness Hamilton expresses it, consists mainly 'of women lying about loose'—a sort of Mohammedan paradise, I suppose, with imitation grottoes and unmaidenly houris. To call such a spectacle a 'dramatic composition' is an abuse of language, and an insult to the genius of the English drama. A menagerie of wild beasts, or an exhibition of model artistes might as justly be called a dramatic composition. Like those, this

[1] Deady, 216, Fed. Cas. 9, 173.

is a spectacle, and although it may be an attractive or gorgeous one, it is nothing more. In my judgment, an exhibition of women 'lying about loose' or otherwise, is not a dramatic composition, and, therefore, not entitled to the protection of the copyright act. On this ground, the application of Maguire et al. for an injunction is denied, with costs."

A mechanical scenic effect in a drama, which is a mere link in a chain of incident, does not constitute a dramatic composition. In *Serrana* v. *Jefferson*,[1] Judge Lacombe said:

"The plaintiffs have elaborated Mr. Vincent Crummles' dramatic conception of a real pump and wash-tubs. In the fourth act of their play entitled 'Donna Bianca, or Brought to Light,' they set in the stage a real tank, three feet square and seven feet deep, filled with natural water. This water flows through a trough from behind a battlement wall at the rear of the stage, falling into the tank and running off underneath the stage. The water in this tank and trough represents a river. It is crossed by a bridge, upon which, after an angry dialogue between the hero and the villain of the play, there ensues a struggle in which the villain falls through the bridge into the water below. Plaintiffs allege that their play is copyrighted, and, by virtue of that circumstance, pray for an injunction against the defendants. These latter are now managing and producing at the Academy of Music in this city, a play entitled 'A Dark Secret.' Here, too, there is placed upon or set into the stage a tank considerably larger than the plaintiffs' tank and trough, also filled with natural water, and intended to represent the River Thames. Into this tank the heorine of the play is thrown, after appropriate dialogue. It is alleged that these immersion scenes in the two plays are prominent features, and add greatly to their attractiveness.

"There is nothing original in the incident thus represented on the stage. Heroes and heroines, as well as villains, of both sexes, have for a time whereof the memory of the theater-goer runneth not to the contrary, been precipitated into conventional ponds, lakes, rivers and seas. So frequent a catastrophe may fairly be regarded as the common property of all playwrights. The plaintiffs' contention is founded solely upon the circumstance that in their play the river into which the fall takes place is mimicked by a tank filled with real water, instead of by an apparatus constructed of cloth, canvas, or painted pasteboard. Such a mechanical contrivance, however, is not protected by a copyright of the play in which it is introduced. The decisions which extend the definition of 'dramatic composition' so as to include situations and 'scenic' effects, do not cover the mere mechanical instrumentalities by which such effects or situations are produced."

And where, even in the absence of mechanical contrivances, no tale is told and no series of events or incidents serve to form a connected narrative, the entertainment is not a dramatic composition within the meaning of the statute. In *Fuller* v. *Bemis*,[2] Marie Louise Fuller, better known as Loie Fuller, filed for copyright

[1] 33 Fed. Rep. 347.

[2] 50 Fed. Rep. 926.

in the office of the Librarian of Congress a description of a "Serpentine Dance." This consisted of an ingenious combination of lights, shadows, stage settings and draperies, and was asserted to be a most graceful and pleasing dance, and an artistic, harmonious and striking tableau. This dance was reproduced, without authority, by a rival artiste, and suit for an infringement of copyright was brought. Judge Lacombe held that the serpentine dance was not a dramatic composition, saying (p. 929):

"It is essential to such a composition that it should tell some story. The plot may be simple. It may be but the narrative or representation of a single transaction; but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary. And when it does, it is the ideas thus expressed which become the subject of copyright. An examination of the description of complainant's dance, as filed for copyright, shows that the end sought for and accomplished was solely the devising of a series of graceful movements, combined with an attractive arrangement of drapery, lights and shadows, telling no story, portraying no character, depicting no emotion. The merely mechanical movements by which effects are produced on the stage are not subjects of copyright where they convey no ideas whose arrangement makes up a dramatic composition. Surely, those described and practiced here convey, to the spectator, no other idea than that a comely woman is illustrating the poetry of motion in a singularly graceful fashion. Such an idea may be pleasing, but it can hardly be called dramatic."

V. DRAMATIZATION OF NOVELS.—Since playwright is the creation of statute, and before 3 and 4 Wm. IV., the author of a copyright published play could not prevent its presentation by others, and since the act of 3 and 4 Will. IV., protected only dramatic rights in pieces dramatic in form, it followed that the author of a published novel could not prevent its dramatization and representation by anyone who chose to undertake the task. The result was that novels having dramatic possibilities were quickly seized upon by enterprising theatrical managers, and put in the form of plays, good or bad in proportion to the taste and ability to pay for hack work possessed by the pirate. The author had to stand by and see his work cut and fitted to the needs of the theater, while he received no royalties, and had no redress.[1] Mr. Justice Blackburn characterized the situation as "shabby and discreditable," but he was obliged to hold that "any person has a right to dramatize the novel without being liable to an action."[2]

---

[1] Report of the British Commission of 1878, Sec. 76-81, to be found in Curtis' The Question of Copyright, p. 231.

[2] Toole *v.* Young, L. R., 9 Q. B. 523, 528. To the same effect are: Tinsley *v.* Lacy, 1 Hem. & M. 747, 32 L. J. Ch. 535; Reade *v.* Conquest, 9 C. B. (N. S,) 755, 30 L. J. (N. S. C. P.) 207; Reade

Various ingenious expedients were devised to defeat this condition of things, and to enable authors to secure, in some measure, to themselves, the dramatic rights in their work. In *Reade* v. *Conquest*, Mr. Charles Reade adopted a plan which was entirely successful. When he set about protecting his dramatic rights in "It is Never too Late to Mend," he first wrote a play which he called "Gold." This was duly registered as a dramatic composition. He then took the play and embodied its action and dialogue in a novel which he entitled, "It is Never too Late to Mend." In accordance with the custom, defendant, who was proprietor of the Grecian Theater, at once procured his brother to dramatize Mr. Reade's novel, and thereafter presented it at his theater under the name, "Never too Late to Mend." The declaration contained two counts. The first charged that plaintiff was the author of the play "Gold," and that defendant, in producing the dramatized version of the novel, "It is Never too Late to Mend," had infringed the copyright in the drama, "Gold." The second count charged that defendant, in presenting the dramatization, infringed the literary copyright in the novel. A demurrer was interposed to the second count, which was sustained[1] on the ground that copyright in a published work exists only by statute, and that as there was no statute reserving rights of dramatization, it was open to everybody to dramatize a published novel, and that consequently the count charging defendant with dramatizing "It is Never too Late to Mend" without Mr. Reade's consent, did not state a cause of action. The parties went to trial upon the first count.[2] Mr. Reade conducted his case in person, and contended:

"It stands admitted on the case, that, in January, 1853, the plaintiff wrote and registered and produced upon the stage a drama called 'Gold,' and that, in January, 1856, he also wrote and published and registered a novel, founded ou the story in the drama, called 'It is Never too Late to Mend.' It also appears that Mr, G. A. Conquest, the defendant's brother, dramatized the novel, calling his drama 'Never too Late to Mend,' and that this last-mentioned drama was produced by the defendant at the Grecian Theater, as alleged in the first count of the declaration. . . . The simple question here is, whether, if a man writes a play and then casts its incidents into the

v. Conquest, 11 C. B, (N. S.) 479; Reade *v.* Lacy, 30 L. J. Ch. 655; Warne *v.* Seebohm, 39 Ch. Div. 73; Schlesinger *v.* Bedford, 63 L. T. 762.

[1] Reade *v.* Conquest, 99 Eng. C. L., 9 C. B. (N. S.) 753.

[2] Reade *v.* Conquest, 103 Eng. C. L., 11 C. B. (N. S.) 478. Reade *v*, Lacy, 30 L. J. Ch. 655, was an action in equity to restrain the sale of copies of "Never too Late to Mend," dramatized from the novel by Mr. Hazlewood, both as an infringement on "Gold," and "It is Never too Late to Mend." Sir W. Page Wood, V. C., granted the injunction. [3]

shape of a novel, he loses his copyright or his sole right of representation in the play. The author of a dramatic piece has by the Dramatic Copyright Act, 3 and 4 W. iv., c. 15, the sole liberty of representing or causing it to be represented at any place of dramatic entertainment: and that right is confirmed by the 5 and 6 Vict. c. 45, s. 21. The 22d section of the last-mentioned statute enacts that 'no assignment of the copyright in any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry-book (required by s. 11) shall be made of such assignment wherein shall be expressed the intention of the parties that such right should pass by such assignment.' By the combined effect of these two statutes, therefore, the author of a drama has two separate rights, which may be conveniently distinguished by the names of copyright and stage-right, either or both of which he may assign; he may assign the one to A, the other to B. Suppose the plaintiff assigned the copy-right, retaining the stage-right, he could not complain of an infringement of the copyright, or vice versa. If the defendant's drama of 'Never too Late to Mend' partly copied from the plaintiff''s drama of 'Gold,' had been published, the plaintiff would have had a remedy under the Act. Has he not an equal right to complain of an infringement of his stage-right? . . . . The question here is, whether by the mere act of publishing his novel of 'It is Never too Late to mend,' the author forfeits his stage-right in the drama of 'Gold.'"

The court sided with the distinguished author,—Sir William Erle, Chief Justice, saying (p. 491):

"The Court has already decided in this case that the representation of the brother's drama was no infringement of the plaintiff's book copyright in his novel: and the defendant now further contended that such representation was no infringement of the plaintiff's stage copyright in his drama called 'Gold,' because the brother was the author of his drama. But we think that this ground of defense fails. The defendant's brother was not the author of those parts of the drama 'Never too Late to Mend,' which he copied directly from the plaintiff's novel, and so indirectly from the plaintiff's drama, 'Gold.'

"It is not necessary to decide whether, if the brother published his drama, he would infringe the plaintiff's book copyright under the 5 & 6 Vict. c. 45, in his novel or drama above mentioned. If that question should arise, it would then be time to decide whether the defendant could find any defense: but it is clear that he could not in that case defend himself on the ground that he was the author of the parts which he copied. Here, the question that arises is in respect of the plaintiff's stage copyright in his drama 'Gold.' This copyright under 3 & 4 W., iv. c. 15, is infringed, if the whole or any part of it should be represented without leave; and it is clear that a very considerable part of it has been represented by the defendant: he is therefore liable in this action, unless he has an excuse. The excuse offered is as above stated, that the brother is the author of these parts. But the fact is not so. The brother is not the author of those parts, it being admitted that he copied them from the plaintiff's composition, and did not compose them himself.

"The fallacy lies in the allegation that the defendant's brother is the author of his drama, 'Never too Late to Mend,' which is true in one sense and untrue in another. He is the author of parts of it; and, in respect of publishing or representing them, he infringes no right of others, and might sue any other who infringed his right. But, in respect of the parts copied from the plaintiff, if he was sued for publishing and infringing the book copyright, he might perhaps be excused under some of the rules relating to literary property, and to the power of abridging or taking extracts therefrom, or the like: but he could not justify on the ground that he was the author; and if, as here, he is sued for representing those parts, and so infringing the stage copyright, he cannot justify as author; and that alone is ths ground which is now to be disposed of.

"The point that the defendant had a defense in his belief that his brother had a right to dramatize the novel, and that therefore he had a right to represent the drama, could not be relied on. If he had the right, his belief would be immaterial; if he had not the right, and had done the wrong complained of, his belief that he was not doing wrong is equally immaterial."[1]

In *Toole* v. *Young*,[2] Hollingshead had written a story called "Not Above His Business," which had been published serially in a periodical called *Good Words*. He afterward wrote a drama called "Shop," which was in effect the story dramatized. The only difference between the two was that in the drama the narrative part of the novel was turned into stage directions, and descriptions of the characters, and of the scenes, furniture, and other matters to be represented on the stage. Hollingshead assigned his manuscript of the drama to the plaintiff. It was never printed, published, or represented. Mr. Grattan, in ignorance of the play "Shop," dramatized "Not Above His Business," and called the resulting play "Glory." The plays were essentially different. When Grattan's assignee presented "Glory," suit was brought. It was held that since Hollingshead's story had been published before the play "Shop," and defendant had an equal right with Hollingshead to dramatize "Not Above His Business," no action would lie,—Lord Justice Cockburn saying:—

"When an author has once given his novel to the world, he cannot take away from other persons the right to dramatize it by himself transforming it into a drama, subject to this—that they must not borrow from his drama, but only from his novel. The author of a drama is not protected by the common law, and what the defendant has done is not forbidden by any statute. I therefore think the non-suit ought not to be set aside."

---

[1] See also Boosey *v.* Fairlie, L. R. 7 Ch. Div. 301, (H. L.), L. R. 4 App. Cas. 711; Chatterton *v* Cave, L. R. 3 App. Cas. 483, 501, and in Australia, Weeks *v.* Williamson, 12 Vict. L. R. 483.

[2] L. R. 9 Q. B., 523.

Mr. Justice Archibald distinguishes *Reade* v. *Conquest* as follows:

"The grounds of that decision appear to be that there the drama was first composed, and afterwards the novel; and if there had been a direct copying by the defendant from the drama, that clearly would have been a violation of the Act; the novel, having been composed after the drama, was regarded by the Court of Common Pleas as in some sense a copy of the drama, so that in copying from the novel for the purpose of dramatizing it, the defendant was treated as copying indirectly from the published drama; a drama produced under these circumstances might be a reproduction of a drama composed by the plaintiff. But the present case is different. The novel is first composed, and then the drama is composed from the novel, and the defendant, in copying from the novel, or in using the novel for the purpose of his drama, cannot be said in any way to have made an indirect use of the plaintiff's drama, the more especially as it is admitted that he was wholly unaware of the plaintiff's or Mr. Hollingshead's drama. And as the novel upon its publication became open to Grattan, as to all the world, for the purpose of dramatizing, the case does not fall within s. 2; the representation of Grattan's drama not being a representation of the plaintiff's drama."

This was followed by Mr. Justice Kekewich in *Schlesinger* v. *Bedford*,[1] where Wilkie Collins had dramatized his novel "The Woman in White," after its publication as a novel, and defendant had made an independent dramatization. It was held that there was no infringement; but in *Schlesinger* v. *Turner*[2] Mr. Collins had written and published the "New Magdalen," first as a play, then as a novel, and defendant had dramatized the novel without knowledge of the play, and it was held that he had been guilty of infringement of the dramatic rights in the play. The rule to be deduced from these cases is, that the publication of a play gives a dramatic right which is a distinct and independent property, and the proprietor is thereby entitled to the sole right of public performance. Transforming the play into a novel gives another and different right, the right to multiply copies, which has nothing to do with the right of public representation. When another person dramatizes the novel, which was in an earlier stage a play, he does not infringe the literary copyright in the novel unless he multiplies copies, but in copying from the novel matter which is also in the earlier play, he indirectly copies from the play, and, in publicly presenting anything thus derived, infringement of the dramatic right necessarily follows. On the other hand, where an author publishes a novel without first dramatizing it himself, he thereby abandons his dramatic rights to the public, and anyone who chooses may drama-

[1] 63 L. T. Rep. (N. S.) 762.

[2] 63 L. T. Rep. (N. S.) 764.

tize it with impunity, and use as much or as little as he sees fit, as long as there are no copies made in violation of the author's literary copyright. The author, after his abandonment of his dramatic rights to the public, is in no better position in relation to his own novel, as far as its dramatization is concerned, than any other member of the public. It is public property for that purpose. He may dramatize it himself, if he will, and so may anybody else. The mere fact that the author may be the first to dramatize after the publication of the novel, gives him no additional rights, and he is remediless against another who also dramatizes, unless there is an actual copying, direct or indirect, from his drama. Both are working with materials common to all, and each will be protected in his original work. There must, of course, be no infringement of literary copyright in conjunction with the exercise of the right of dramatization. This is illustrated in *Tinsley* v. *Lacy*.[1] Miss Braddon had written two popular novels, "Aurora Floyd" and "Lady Audley's Secret." A Mr. Suter dramatized both, and they were being performed at the Queen's Theater. In addition, copies of the plays had been printed and were distributed among the audience to enable them better to follow the performance. It was proved that a large part of the dramas, including the most striking incidents, and much of the language, had been taken bodily from the novels. Vice-Chancellor Page-Wood held that anyone might have acted the drama or told the story without being guilty of infringement.

"The intention of the Copyright Act was, no doubt, to secure to authors the full and complete benefit of their works; but the Legislature did not think it right to provide that the works of an author should not be dramatized and used in another shape. It has been held, that to do this is not an invasion of the rights given by the statute; and that anyone who pleases may dramatize the works of another person, without coming within the enactment which prohibits the multiplication of copies. The only way in which an author can prevent other persons from reciting or presenting as a dramatic performance the whole or any portion of a work of his composition, is himself to publish his work in the form of a drama, and bring himself within the scope of dramatic copyright."

It was therefore held that, to the extent only that the plays had been printed, there had been infringement.

In *Warne* v. *Seebohm*,[2] Mrs. Burnett sought to protect her dramatic rights in "Little Lord Fauntleroy." The defendant had, without her knowledge, begun the dramatization of the book. When he

[1] 1 Hem. & M. 747.

[2] 39 Ch. Div. 73.

had partially finished his work, he wrote to Mrs. Burnett, telling what he had done and proposed to do, and saying he hoped that in the production of his play he would receive her "complete sanction." She replied, however, saying that she intended to dramatize the book, and had done some work upon it, and she protested vigorously against his proposed undertaking. Mr. Seebohm, nevertheless, proceeded with his work, and presented the play at the Prince of Wales Theater. He afterwards wrote to Mrs. Burnett that the play was an immense success. The evidence showed that he had appropriated practically without change, large portions of the dialogue, the names of the principal characters, the situations and plot, and that the explanatory and descriptive matter in the novel had been transferred to the play as dialogue and stage directions. Four typewritten copies had been made, of which one had been sent to the Lord Chamberlain, the licenser of plays, and the remainder were used as prompt books by the players.

It was held that as to the dramatization of her book, Mrs. Burnett was without redress, but the making of the four copies was a violation of her literary copyright, and the further making of copies was enjoined.[1] Mr. Justice Stirling asserted: "There is a possible mode by which, without infringing the plaintiff's copyright, the defendant may be able to make copies of the play." He does not state what that mode is, but it is not difficult to guess it. If defendant, instead of copying the dialogue from the novel into the four type-written copies, had taken four copies of the novel and simply marked the passages he desired his actors to recite, he could not have been enjoined.

EDWARD S. ROGERS

CHICAGO

[TO BE CONTINUED]

[1] Following Tinsley *v.* Lacy, 1 Hem. & M. 747.